Yong Teck Lee v Harris Mohd Salleh & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S-04-75 OF 2001
ABDUL HAMID MOHAMAD, MOHD SAARI AND KC VOHRAH JJCA
6 JUNE 2002

Administrative Law *— Exercise of judicial functions — Judicial review — Whether the 'election court' is a tribunal inferior to the High Court — Whether decision of an election judge is a decision of a tribunal inferior to the High Court*

Civil Procedure *— Appeal — Election judge, from — Whether a decision of an election judge in an election petition is appealable to the appellate courts*

Election *— Election court — Nature of — Whether election court inferior to High Court — Whether decision of an election judge is a decision of a High Court judge*

This appeal arose from two election petitions. Both petitions concerned the general election for the state assembly of the constituency of Likas, known as 'N13'. The present appellant was the second respondent in Election Petition No K5 of 1999 and third respondent in Election Petition No K11 of 1999. The present respondent was the petitioner in both petitions. They were both candidates in the said election, which was won by the appellant. In the court below, both the petitions were consolidated. The learned election judge declared that the 1998 Electoral Roll for Likas Constituency (N13) was illegal and that the said election was null and void. The appellant appealed to the Court of Appeal which directed the parties to address the court on the issue of whether a decision of an election judge in an election petition is appealable to the Court of Appeal.

Held, dismissing the appeal:

(1) (per **Abdul Hamid Mohammad JCA**) For the purpose of judicial review the 'election court' is not a tribunal inferior to the High Court, the orders of which are susceptible to judicial review. That is a very sensible view to take, because, when the Chief Judge himself sits as an 'election judge', it is unimaginable that his decision will be subject to judicial review by a High Court judge. Similarly, when a High Court judge is nominated by the Chief Judge to try an election petition, he sits as a judge and not as a chairman or member of a tribunal. Therefore it is perfectly correct to treat the decision of an election judge not as a decision of a tribunal inferior to the High Court for the purpose of judicial review. However, a decision of an election judge is not a decision of a High Court or a judge thereof (see pp 239I–240B, 241A).

(2) (per **Abdul Hamid Mohammad JCA**) All the appellate courts in this country, be it the former Court of Appeal, the former Federal Court, the Privy Council, the Supreme Court and the present Court of Appeal, have unanimously over the years held that the decision of an election judge is not subject to appeal. Thus, the decision of an election judge is not appealable to the Court of Appeal (see pp 241A–B, 244F).

(3) (per **KC Vohrah JCA** dissenting) The primary jurisdiction conferred under art 121(1B)(a) of the Federal Constitution upon the Court of Appeal is to hear appeals from decisions of the High Court or of a judge thereof. While the primary jurisdiction may be enlarged by virtue of art 121(1B)(b), it is not to be abrogated, limited or restricted and any attempt to abrogate, limit or restrict the primary jurisdiction is void for inconsistency under art 4(1) of the Federal Constitution (see p 249B–C).

(4) (per **KC Vohrah JCA** dissenting) The application for leave is not to be left to the executive to decide but to judges who have to judicially consider on the material put before them that there is an arguable case. For the leave application the several criteria to be judicially considered arise through judicial decisions, rules of court, federal and state law and may for example include time bars to prevent stale cases from being brought up. Federal law may regulate the leave system not so much as to prevent or deny completely an aggrieved litigant from appealing but to give him an opportunity to first show in some time tested areas where appeals do not normally succeed that he has an arguable case. Thus, to the extent that s 36 of the Act purports to exclude the jurisdiction of the Court of Appeal to hear an appeal from a final order of an election judge, it is void and of no effect by operation of art 4(1), it being inconsistent with art 121(1B)(a) of the Federal Constitution. Similarly, para (d) of s 68 of the Courts of Judicature Act 1964 which purports to exclude the jurisdiction of the Court of Appeal by providing that where by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final no appeal shall be brought to the Court of Appeal, is void and of no effect (see pp 251H–252A, D–E).

[Bahasa Malaysia summary

Rayuan ini berbangkit daripada dua petisyen pilihanraya. Kedua-dua petisyen tersebut berhubung dengan pilihanraya umum untuk Dewan Undangan Negeri bagi kawasan pilihanraya Likas, yang dikenali sebagai 'N13'. Perayu semasa adalah responden kedua dalam Petisyen Pilihanraya No K5 Tahun 1999 dan responden ketiga dalam Petisyen Pilihanraya No K 11 Tahun 1999. Responden adalah pempetisyen di dalam kedua-dua petisyen. Kedua-dua mereka adalah

calon di dalam plihanraya tersebut, yang mana telah dimenangi oleh perayu. Dalam mahkamah di bawah, kedua-dua petisyen tersebut telah digabongkan. Hakim pilihanraya yang bijaksana telah mengisytiharkan bahawa Daftar Pemilih 1998 untuk Kawasan Pilihanraya Likas (N13) adalah tidak sah dan bahawa pilihanraya tersebut adalah batal dan tidak sah. Perayu telah merayu kepada Mahkamah Rayuan yang telah mengarahkan pihak-pihak tersebut memutuskan atas isu sama ada keputusan seorang hakim pilihanraya di dalam sesuatu petisyen pilihanraya boleh dirayui di Mahkamah Rayuan.

Diputuskan menolak rayuan tersebut:

(1) (oleh **Abdul Hamid Mohammad HMR**) Bagi tujuan kajian semula kehakiman 'election court' bukannya sebuah tribunal yang lebih rendah daripada Mahkamah Tinggi, yang mana perintah-perintahnya boleh dikenakan kaji semula kehakiman. Itu adalah pandangan waras yang seharusnya dibuat, kerana, apabila seorang Ketua Hakim sendiri bersidang sebagai 'election judge', adalah tidak dapat dibayangkan bahawa keputusan beliau akan tertakluk kepada kajian semula kehakiman oleh seorang Hakim Mahkamah Tinggi. Begitu juga, apabila seorang Hakim Mahkamah Tinggi dipilih oleh Ketua Hakim untuk membicarakan suatu petisyen pilihanraya, beliau bersidang sebagai seorang hakim dan bukan sebagai seorang pengerusi atau ahli sesebuah tribunal. Oleh itu ianya adalah sesungguhnya betul untuk menganggapkan keputusan seorang hakim pilihanraya bukannya sebagai satu keputusan sebuah tribunal yang lebih rendah dari Mahkamah Tinggi bagi tujuan kajian semula kehakiman. Walau bagaimanapun, keputusan seorang hakim pilihanraya bukannya keputusan sebuah Mahkamah Tinggi atau seorang hakim Mahkamah Tinggi (lihat ms 239I–240B, 241A).

(2) (oleh **Abdul Hamid Mohammad HMR**) Kesemua mahkamah-mahkamah rayuan di dalam negara ini, sama ada ianya Mahkamah Rayuan yang dahulu, Mahkamah Persekutuan yang dahulu, Majlis Privi, Mahkamah Agong dan Mahkamah Rayuan semasa, telah sebulat suara sepanjang masa yang berlalu memutuskan bahawa keputusan seorang hakim pilihanraya tidak tertakluk kepada rayuan. Oleh itu, keputusan hakim pilihanraya tidak dapat dirayui di Mahkamah Rayuan (lihat ms 241A–B, 244F).

(3) (oleh **KC Vohrah HMR** menentang) Bidang kuasa utama yang diberikan di bawah per 121(1B)(a) Perlembagaan Persekutuan ke atas Mahkamah Rayuan adalah untuk mendengar rayuan-rayuan daripada keputusan-keputusan Mahkamah Tinggi atau oleh hakimnya. Sementara bidang kuasa utama tersebut mungkin boleh diperluaskan menurut per 121(1B)(b) ianya tidak boleh dibatalkan, dihadkan atau disekat dan sebarang percubaan untuk membatalkan, menghadkan atau menyekat bidang kuasa utama

tersebut adalah tak sah kerana tidak bersesuaian di bawah per 4(1) Perlembagaan Persekutuan (lihat ms 249B–C).

(4) (oleh **KC Vohrah HMR** menentang) Permohonan untuk kebenaran tidak seharusnya dibiarkan untuk diputuskan oleh eksekutif tetapi kepada hakim-hakim yang haruslah mempertimbangkan secara kehakiman atas bahan-bahan yang dikemukakan di hadapan mereka bahawa terdapatnya satu kes yang boleh dihujahkan. Untuk permohonan kebenaran beberapa kriteria yang harus dipertimbangkan secara kehakiman berbangkit melalui keputusan-keputusan kehakiman, kaedah-kaedah mahkamah, undang-undang persekutuan dan negeri dan boleh contohnya termasuk halangan-halangan masa untuk mencegah kes-kes lama dari dikemukakan. Undang-undang persekutuan boleh melaraskan sistem kebenaran bukan semata-mata untuk mencegah atau sesungguhnya menafikan seorang litigan yang terkilan daripada membuat rayuan tetapi untuk memberikan beliau satu peluang untuk pertamanya menunjukkan dalam beberapa lingkungan yang telah diuji di mana rayuan-rayuan tidak selalunya berjaya bahawa beliau mempunyai satu kes yang boleh dihujahkan. Oleh itu, hingga kepada had bahawa s 36 Akta tersebut bertujuan untuk mengecualikan bidang kuasa Mahkamah Rayuan bagi mendengar sesuatu rayuan daripada perintah muktamad seorang Hakim pilihanraya, ianya tak sah dan tidak berkesan dengan pengendalian per 4(1), ianya tidak konsisten dengan per 121(1B)(a) Perlembagaan Persekutuan tersebut. Begitu juga, perenggan (d) s 68 Akta Mahkamah Kehakiman 1964 yang bertujuan untuk mengecualikan bidang kuasa Mahkamah Rayuan dengan memperuntukkan bahawa di mana melalui sebarang undang-undang bertulis yang ketika ini berkuatkuasa, penghakiman atau perintah Mahkamah Tinggi adalah secara nyata diisytiharkan sebagai muktamad maka tiada rayuan seharusnya dibawa kepada Mahkamah Rayuan adalah tidak sah dan tidak berkesan (lihat ms 251H–252A, D–E).]

Notes

For cases on appeal from an election judge, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 717.

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 76–83.

Cases referred to

AJ Arzu v AE Arthurs & Anor [1965] 1 WLR 675 (refd)

Dason Gaban v Zulkifle bin Majun & 21 Ors Cases [1982] 1 MLJ 315 (refd)

Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Ahir bin Syed Darus [1981] 1 MLJ 29 (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (refd)
DYTM Tengku Idris Shah ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 (refd)
Edward Lionel Sennayake v Herath Mudiyanselage Navaratne [1954] AC 640 (refd)
Ignatius Stephen Malanjun v Election Judge Sabah & Anor (Supreme Court Civil Appeal No 03–42–89 (refd)
Lam Kong Co Ltd v Thong Guan Co Ptd Ltd [2000] 4 MLJ 1 (folld)
Megat Najmuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd [2002] 1 MLJ 385 (refd)
Merdeka University Bhd v Government of Malaysia [1981] 2 MLJ 356 (refd)
Perting Timor Election, Re (No 2) [1962] MLJ 333 (refd)
Selvanathan a/l Savarimuthu v Suruhanjaya Pilihanraya Malaysia (Permohonan Sivil No W–08–417–1998) (refd)
Tengku Razaleigh bin Tengku Mohd Hamzah v Election Judge for Election Petition No 33–6–1995 & Ors [1996] 4 MLJ 66 (refd)
Tunku Abdullah v Ali Amberan [1971] 1 MLJ 25 (refd)
Wee Choo Keong v Lee Chong Meng [1998] 1 MLJ 434 (refd)

Legislation referred to

Constitution (Amendment) Act 1994 (Act A885)
Courts of Judicature (Amendment) Act 1972 s 67(1)
Courts of Judicature (Amendment) Act 1994 (Act A886)
Courts of Judicature Act 1964 ss 24, 50, 67, 68(1)(a), (2), (3)
Courts Ordinance 1948 s 37(c), (d)
Election Offences (Amendment) Act 1986
Election Offences Act 1954 ss 2, 11(c), (d), 28, 29, 32, 33(1), (4), 34, 36, 37
Election Petition Rules 1954
Federal Constitution arts 4(1), 118, 121(1B)(a), (b), (2), 128(3)
Malaysia Act 1963 s 14

Gavan Griffith QC (*Alex Decena, PK Lim, John Sikayun* and *Lawrence Dhong* with him) (*Luping & Co*) for the appellant.
Ansari Abdullah (*Rezuan Borhan* with him) (*Ansari & Co*) for the respondents.

Abdul Hamid Mohamad JCA: This appeal arises from two election petitions, ie Election Petition No 5 of 1999 and Election Petition No 11 of 1999. Both petitions concern the general election for the State Assembly for the constituency of Likas, known as 'N13'. The present appellant was the second respondent in Election Petition No K5 of 1999 and the third respondent in Election Petition No K11 of 1999. The present respondent was the petitioner in both petitions. They were both candidates in the said election which was won by the appellant.

In the court below, both the petitions were consolidated.

A Election Petition No 5 of 1999 concerns the erection of four billboards alleged to have contained false statements about the respondent and alleged to have been made and/or put by the appellant. The election judge found that the appellant had committed an offence under s 11(c) and (d) and s 32 of the Election Offences Act 1954.

B Election Petition No 11 of 1999 was based on three main grounds:

(1) that the Election Rolls 1998 which was used in the said election was illegal as (it was alleged) it contained names of non-citizens and persons who had been convicted for possession of fake identity cards;

(2) that there were corrupt practices on the part of the appellant;

C (3) that there was conspiracy between the Federal Government and Barisan Nasional (the party to which the appellant represented in the said election).

The learned judge found in favour of the respondent on the first ground and held that the 1990 Electoral Roll for the said constituency 'was illegal'.

D Regarding the second ground, the learned judge found that the respondent 'had failed to prove beyond reasonable doubt the offence of bribery or corrupt practices'.

Regarding the third ground, the learned judge found that there was no evidence of the alleged conspiracy.

E In conclusion, the learned judge declared that the 1998 Electoral Roll for Likas Constituency (N13) was illegal and that the said election was null and void.

The appellant appealed to this court.

When this appeal came before us, we directed the learned counsel for F both parties to address us on one point first, and that is whether a decision of an election judge in an election petition is appealable to this court. After hearing the arguments of the learned counsel for both sides, we reserved our judgment as a constitutional issue of great importance and wide implications has been raised. This judgment is in respect of that issue only.

G The argument of the learned Queen's Counsel for the appellant may be summarized thus: art 121(1B)(a) vests the jurisdiction in the Court of Appeal to determine appeals from decisions of a High Court or a judge thereof, regardless of whatever the position was as to the jurisdiction of the Federal Court (or Supreme Court) prior to the creation of the Court of Appeal. By virtue of art 121(1B)(b), this 'primary jurisdiction' may be H enlarged by federal law but not abrogated, limited or restricted. Any law that attempts to do so is void for inconsistency under art 4(1) of the Constitution. Jurisdiction under ss 32, 33 and 36 of the Election Offences Act 1954 is vested exclusively in the High Court by art 118 of the Constitution and those same sections. To the extent that s 36 of the Election Offences Act 1954 purports to exclude the jurisdiction of the I Court of Appeal to hear an appeal from a final order of an election judge, it is void and of no effect by operation of art 4(1), it being inconsistent with art 121(1B)(a) of the Constitution. The decisions of the courts prior to 24

June 1994, the date of the creation of the Court of Appeal, are not in point as they do not concern art 121(1B).

For easy reference, the relevant provisions of the Constitution are reproduced.

Article 4(1):

> This constitution is the supreme law of the federation and any law passed after Merdeka Day which is inconsistent with this constitution shall, to the extent of the inconsistency, be void.

Article 118:

> No election to the House of Representatives or to the Legislative Assembly of a State shall be called into question except by an election petition presented to the High Court having jurisdiction where the election was held.

Both these provisions were not touched by the Constitution (Amendment) Act 1994 (Act A885) that, inter alia, created the Court of Appeal with effect from 24 June 1994.

Article 121(1B):

> There shall be a court, which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry in Kuala Lumpur, and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the court); and
>
> (b) such other jurisdiction as may be conferred by or under federal law.

This clause was inserted by Act A885 and came into force on 24 June 1994. Prior to that date, appeals from the High Court went straight to the Supreme Court, which was renamed 'Federal Court' by the same amendment Act.

Article 121(2):

> There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;
>
> (b) such original or consultative jurisdiction as is specified in arts 128 and 130; and
>
> (c) such other jurisdiction as may be conferred by or under federal law.

Prior to 24 June 1994 (when amendment A885 came into force) cl (2)(a) read as follows:

> There shall be a court which shall be known as the Mahkamah Agung (Supreme Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:

A (a) exclusive jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the court.

The relevant provisions of the Election Offences Act 1954 are ss 32, 33 and 36. Section 32 empowers the election judge to declare the election of a candidate at an election void on any of the grounds provided thereto.

Section 33(1) provides:

> Every election petition shall be tried by the Chief Judge or by a Judge of any High Court nominated by the Chief Judge for the purpose:
>
> Provided that the Chief Judge shall not nominate a Judge of a High Court of which he is not Chief Judge without consulting the Chief Judge of that High Court.

This section was amended by the Courts of Judicature (Amendment) Act 1994 (Act A886) that came into force as Act A885. The only amendment made was that the word 'Justice' wherever found was substituted with the word 'Judge'. These are consequential amendments resulting from Act A885.

It should also be noted that, in respect of interlocutory matters in connection with an election petition, sub-s (4) provides:

> Unless otherwise ordered by the Chief Judge, all interlocutory matters in connection with an election petition may be dealt with and decided by any judge of the High Court whose decision shall be final.

Section 36, in brief, requires the election judge, at the conclusion of the trial to determine, inter alia, whether the election was void and rectify such determination. Upon such certificate being given, such determination shall be final.

Before going any further, something should be said about the principles of the interpretation of constitutions.

The Supreme Court, the highest court in this country before it was renamed the 'Federal Court', in a five judge panel, has reiterated the principles in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697. Abdul Hamid Omar LP had this to say at p 709 of the report:

> Secondly, as the Judicial Committee of the Privy Council held in *Minister of Home Affairs v Fisher*[[1980] AC 319] at p 329, a constitution should be construed with less rigidity and more generosity than other statutes and as sui juris, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.
>
> In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in *Attorney General of the Commonwealth, ex relatione McKinley v Commonwealth of Australia* [[1975] 135 CLR 1] at p 17:
>
> > 'the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no

doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.' A

In our approach to this appeal we have accordingly kept in the forefront of our minds the principles aforesaid.

Raja Azlan Shah Ag LP (as he then was) in *Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Ahir bin Syed Darus* [1981] 1 MLJ 29 said at p 32 of the report: B

> In interpreting a constitution, two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other acts' (see *Minister of Home Affairs v Fisher* [[1979] 3 All ER 21]). A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms'. The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds* [[1979] 3 All ER 129]. C D E

See also *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356. F

Of late, the present Federal Court has adopted the 'purposive approach' of interpreting the Constitution relying, in particular, on the provision of s 17A of the Interpretation Acts 1948 and 1967 (Act 388). The judgment of Mohamed Dzaiddin FCJ (as he then was) in *Lam Kong Co Ltd v Thong Guan Co Ptd Ltd* [2000] 4 MLJ 1 is one such example. This judgment was followed in *DYTM Tengku Idris Shah ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57. Haidar FCJ delivering the judgment of the Federal Court, said at p 69 of the report: G

> This purposive approach has now been given statutory recognition by our Parliament enacting s 17A in the Interpretation Acts 1948 and 1967 (Act 388) which reads: H
>
> > In the interpretation of a provision of an Act, a construction that would promote the purpose of object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
>
> Recently, the Federal Court in a majority judgment in *Lam Kong Co Ltd v Thong Guan Co Ptd Ltd* [2000] 4 MLJ 1, Mohamed Dzaiddin FCJ (now CJ Malaysia) took the purpose or object of the legislature as provided by s 17A of the Interpretation Acts 1948 and 1967 (Act 388) for the construction of s I

A 68(1)(a) of CJA [Courts of Judicature Act 1964] on the 'filter' principle. In view of the statutory recognition we can and should adopt a purposive approach in the interpretation of 'Ruler' for the purposes of arts 181, 182 and 183.

It should be noted that in *Lam Kong Co Ltd*, the Federal Court adopted the purposive approach in considering s 68(a) of the Courts of Judicature Act 1964, one of the sections presently under consideration. I shall adopt the same approach.

Is the decision of the Chief Judge or a judge of a High Court sitting as an 'election judge' a decision of a High Court?

In this respect, the learned Queen's Counsel relied on art 118 of the Constitution and the cases of *Wee Choo Keong v Lee Chong Meng* [1998] 1 MLJ 434. *Tengku Razaleigh bin Tengku Mohd Hamzah v Election Judge for Election Petition No 33–6–1995 & Ors* [1996] 4 MLJ 66 and *Dason Gaban v Zulkifle bin Majun & 21 Ors Cases* [1982] 1 MLJ 315.

Wee Choo Keong is a judgment of the Federal Court. The applicant was elected as a Member of Parliament, but in the election petition filed subsequently, he was disqualified and unseated by the election judge. The applicant applied to the High Court for leave to apply for an order of certiorari to quash the decision of the election judge. He was unsuccessful in the High Court and also in the Court of Appeal. He appealed to the Federal Court. The issue was whether an election judge was amenable to an order of certiorari. The Federal Court held that the court in which the election judge sits to hear an election petition is not an inferior court or any statutory authority or tribunal which is amenable to an order of certiorari. Prerogative order cannot be issued by the High Court against an 'election court' which is not an inferior court.

In arriving at that conclusion, the Federal Court, through the judgment of Peh Swee Chin FCJ relied on the provision of s 33 of the Election Offences Act 1954 and the fact that 'election petitions have not been known to have been filed anywhere else except in the High Court and the title of the election petition in question reads 'Dalam Mahkamah Tinggi di Kuala Lumpur'.

The learned judge also relied on art 118 of the Federal Constitution and, inter alia, said at p 434:

> High Court is the designated court for an election judge to sit in.

The learned judge then referred to s 24 of the Courts of Judicature Act 1964 and said at p 434:

> ... Article 118 of the Federal Constitution in our view, seems to provide the High Court with this additional specific jurisdiction not mentioned in the said Act.
>
> Thus, the election court is, in fact, the High Court.

The judgment of the High Court in *Tengku Razaleigh* is to the same effect.

As far as this court is concerned, it is settled law that for the purpose of judicial review, the 'election court' is not a tribunal inferior to the High

Court, the orders of which are susceptible to judicial review. That is a very sensible view to take, because, when the Chief Judge himself sits as an 'election judge', it is unimaginable that his decision will be subject to judicial review by a High Court judge. Similarly, when a High Court judge is nominated by the Chief Judge to try an election petition, he sits as a judge not as a chairman or member of a tribunal. Therefore it is perfectly correct to treat the decision of an election judge not as a decision of a tribunal inferior to the High Court for the purpose of judicial review.

But that does not make a decision of an election judge a decision of the High Court in the ordinary sense. It must be noted that the only reference made to the High Court in art 118 is with regard to the place where an election petition is to be presented. Surely, a place for the presentation of an election petition has to be named as there is no such establishment as an election court and as it is either the Chief Judge or a judge of a High Court who may be nominated to try the petition. That is provided as a matter of convenience.

Furthermore, the fact that the petition is filed in a High Court does not empower a judge of that High Court to try the petition as in other cases filed therein. He has to be nominated by the Chief Judge for that purpose. In practice, only a few judges of the High Court are nominated after every general election to try the petitions and, quite often, the resident High Court Judge is not the one nominated for such purpose.

Further, it must be noted that the Election Offences Act 1954 makes a clear distinction between an election judge and a High Court judge. Section 2 provides an interpretation of an 'election judge':

> 'Election Judge' means the Chief Judge or any judge nominated by the Chief Judge under s 33;

The term 'election judge' is used throughout the Act — see, for example, ss 28, 29, 32, 33, 36, and 37.

On the other hand, when the Act refers to a High Court judge, the words used are 'any judge of the High Court'. A clear example is sub-s (4) of s 33 of the Act:

> Unless otherwise ordered by the Chief Judge, all interlocutory matters in connection with an election petition may be dealt with and decided by *any judge of the High Court* whose decision shall be final'. (Emphasis added).

The distinction was pointed out by Suffian LP in *Dason Gaban* when he said at p 316:

> Here however, while it is true that Seah J was a judge of the High Court, he made the order appealed from not in exercise of the ordinary jurisdiction of a High Court judge, but of the special jurisdiction of an election judge, having been specially so nominated by the Chief Justice under s 33 of the Election Offences Act.

There is therefore clearly a distinction between a High Court judge and an election judge.

A On these grounds, in my judgment, a decision of an election judge is not a decision of a High Court or a judge thereof. On this ground alone the appeal could be dismissed.

Assuming that I am wrong, I shall now consider the other arguments. First, I shall look at the decided cases, so far. I have not been able to find B even one judgment of any court in this country that says that a decision of an election judge is appealable to a higher court. On the other hand, I find that ever since elections were held in this country, all the appellate courts, be it the former Court of Appeal, the former Federal Court, the Privy Council, the Supreme Court and the present Court of Appeal are all of the same view that such decisions are not appealable.

C I shall take the cases in chronological order.

Re Perting Timor Election (No 2) [1962] MLJ 333 is a judgment of the former Court of Appeal. In that case, an election judge made an interim order in Election Petition No 6 of 1961. The election, it is to be noted, is an election to the Town Council of Bentong in Pahang. The respondent D filed a notice of appeal against the said order. The matter for consideration by the court was the motion by the petitioner that the notice of appeal should be struck out on the ground that no appeal should be brought by virtue of s 37(c) and (d) of the Courts Ordinance 1948.

Hill Ag CJ sitting with Good JA and Suffian J (as he then was), E delivering the judgment of the court, said at p 333:

> The matter only presents difficulty because the order against which the appeal is lodged is an interim or interlocutory order made by the election judge in preliminary stages of the hearing of the election petition. The learned judge had not determined the issues set out in s 36 of the Election Offences Ordinance 1954 (No 9 of 1954) and had not certified his determination. If he F had, such determination would be final according to this section and no appeal would lie for s 36 states, inter alia, 'upon such certificate being given, such determination shall be final.

At p 334 of the report, the learned acting Chief Justice said:

> What then is the position with regard to appeals from interim or interlocutory G orders made by an election judge? The right of appeal is not an inherent right, but one that must be expressly granted or conferred. Neither in the Constitution nor in the Courts Ordinance, nor in the Election Offences Ordinance is this right conferred and in my view there is therefore no such right of appeal.

It should be noted that the judgment was delivered on 18 July 1962. At that H time the words 'whose decision shall be final' were not yet part of sub-s (4) of the said s 33. Those words were only added by the Election Offences (Amendment) Act 1986 (Act A640) that came into force on 2 May 1986. Yet, even without those words, the former Court of Appeal held that even a decision in an interlocutory matter by 'any judge of the High Court' was not appealable to the then Court of Appeal.

I *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261 is a decision of the Privy Council. For the present purpose, it is sufficient to say that the Board held at p 263 that:

> There was no appeal to their Lordship's Board for it has been settled by a long line of decisions of their Lordships starting with *Theberge v Laudrey* [1876] 2 AC 102, in 1876 and ending with *Arzu v Arthurs* [1965] 1 WLR 675 ... in 1964 that their Lordships will not entertain appeals from the determination of an election judge.

And again:

> Looking at ss 33 and 36 (of the Election Offences Ordinance 1954), while it is clear that s 36 enacts that final orders are not subject to appeal, there were no such limiting words in s 33(4).

The issue whether a decision in an interlocutory matter is appealable arose again in *Dason Gaban*. Suffian LP distinguished the facts in *Devan Nair* in considering the observation of the Privy Council and invited Parliament to 'consider the ambiguity in the law disclosed in these appeals, decide as a matter of policy whether or not interlocutory orders made in an election petition should be appealable and legislate accordingly.'

Clearly, it was that invitation that led the Parliament to amend sub-s (4) of s 33 by adding the words 'whose decision shall be final'. in 1986.

Be that as it may, we are concerned with a final order of an election judge.

Tunku Abdullah v Ali Amberan [1971] 1 MLJ 25 is again a judgment of the Federal Court, consisting of Azmi LP, Suffian and Gill FJJ (as they then were). In that case, the appellant sought to appeal from the decision of the election judge against the finding that he was guilty of corrupt practice and against the award of costs against him. The Federal Court held that the final order of an election judge was unappealable and therefore the Federal Court had no jurisdiction to entertain the appeal. *Devan Nair*, *AJ Arzu v AE Arthurs & Anor* [1965] 1 WLR 675, *Edward Lionel Sennayake v Herath Mudiyanselage Navaratne* [1954] AC 640 and *Re Perting Timor Election* were followed.

It is interesting to note that a similar argument was put forward in that case, and I quote from the judgment of Suffian FJ (as he then was) at p 27:

> It is submitted that art 118 overrides all the provisions in the Election Offences Act relating to election judges. Dato' Nahappan does not say that the learned judge had no jurisdiction to determine this election petition. All he says is that in view of art 118, the learned judge must be deemed to have been sitting as an ordinary judge of the High Court, and from his judgment an appeal lies under s 67 of the Courts of Judicature Act. Dato' Nahappan points out that art 118 was not brought to the notice of the Federal Court of appeal in *Re Perting Timor Election* [1962] MLJ 333, at p 334 or to the notice of the Privy Council in the *Devan Nair* case [1967] 1 MLJ 261 where it was held that there is no appeal from the decision of an election judge;

The learned judge (as he then was) went on to say:

> I am of the opinion that this court has no jurisdiction to entertain this appeal.

And again:

> In my judgment, there is no inconsistency between our Election Offences Act and art 118 of the Constitution, for art 118 does not guarantee the citizen the

A right of appealing against the decision of a High Court judge, and it is therefore open to Parliament to provide (by law) which decisions of a High Court may be appealed against and which not. By s 36 of the Election Offences Act, Parliament has clearly provided that the determination of a judge hearing an election petition shall be final. When Parliament enacted s 67 of the Courts of Judicature Act, it knew of the court's reluctance to accept B jurisdiction in a case concerning the election of a member of the legislature and that court will not entertain an appeal such as the one under consideration. If Parliament had intended to change this law, surely it would have written s 67 of the Courts of Judicature Act in such a way as to make it clear beyond doubt that the Federal Court has jurisdiction to hear appeals from the judgment of the High Court not only in any civil matter but also in election petitions. It did not do so and I am convinced that the reason for that C is that Parliament did not intend to change the law to render the decisions of an election judge appealable.

It should be pointed out that the provision of art 118 of the Federal Constitution is the same now as it was on 14 August 1970 when that case was decided by the then Federal Court. The then s 67 was the same as the D present s 67(1) except that s 67 was renumbered as s 67(1) by the Courts of Judicature (Amendment) Act 1972 (Act A126) with effect from 1 November 1972, that the words 'Court of Appeal' was substituted for the words 'Federal Court' by Act A886 with effect from 24 June 1994 and the word 'cause or' was added by Act A909 also with effect from the same date, which is not material for our purpose now.

E

Dason Gaban is again a judgment of the Federal Court. In that case, a number of election petitions were presented in the High Court at Kota Kinabalu, Sabah. The applicants argued in 20 of the petitions that the petitions should be struck out on the grounds of failure to comply with the provisions of the Election Petition Rules 1954 and s 34 of the Election F Offences Act 1954. The learned judge rejected all the applications and refused to strike out any of the petitions. The applicants appealed to the Federal Court. The court dismissed the appeal on a preliminary objection on the ground that the court had no jurisdiction to hear the appeal.

Suffian LP, sitting with Lee Hun Hoe (CJ Borneo) and Hashim Yeop G A Sani J (as he then was), delivering the judgment of the court, said at p 316:

> We dismissed these appeals because there is no inherent right of appeal to us, such a right if any must be granted by statute, and if there is any right of appeal at all it must be under s 67(1) of the Courts of Judicature Act. That section provides:
>
> H
>
> > 'The Federal Court shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this or any other written law regulating the terms and conditions upon which such appeals shall be brought.'
>
> I

Wee Choo Keong is a judgment of this court. It is this judgment that went up to the present Federal Court which confirmed it and which has been

referred to earlier. It concerns an application for an order of certiorari. However, Abdul Malek Ahmad JCA (as he then was) in his judgment at p 56 said:

> The law is well settled that there shall be no appeal from the decision of an election judge. Section 36 of the Election Offences Act 1954 states that the election judge shall determine at the conclusion of the trial of an election petition whether the candidate whose return or election is complained of or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination to the election commission or to the state authority, as the case may be, and upon such certificate being given such determination shall be final.
>
> This legislative provision had been given judicial sanction as long ago as in 1962 by the Court of Appeal in *Re Perting Timor Election (No 2)* [1962] MLJ 333 and in 1970 when the Federal Court decided in *Tunku Abdullah v Ali Amberan* [1971] 1 MLJ 25 that the final order of an election judge is unappealable and therefore, the Federal Court had no jurisdiction to entertain the appeal. The same situation arose again in 1982 when the Federal Court held in *Dason Gaban v Zulkifle bin Majun & Ors* [1982] 1 MLJ 315 that there is no inherent right of appeal to the Federal Court from the decision of an election judge.

It is not necessary for me to discuss the unreported judgment of the Supreme Court in *Ignatius Stephen Malanjum v Election Judge Sabah & Anor* (Supreme Court Civil Appeal No 03–42–89, reproduced in the judgment of Abdul Malek Ahmad JCA (as he then was) in *Wee Choo Keong* at p 58. It is to the same effect that there is no appeal from a decision of an election judge.

Similarly this court in *Selvanathan a/l Savarimuthu v Suruhanjaya Pilihanraya Malaysia* (Permohonan Sivil No W–08–417–1998) dismissed an application for leave to appeal against an order of costs made by an election judge as there is no appeal from that decision.

It is thus clear that all the appellate courts in this country, be it the former Court of Appeal, the former Federal Court, the Privy Council, the Supreme Court and the present Court of Appeal, have unanimously over the years held that the decision of an election judge is not subject to appeal.

However, before us it is argued that this court should not look at decisions before 24 June 1994 as they are not relevant, because, at that time, this court has not been established yet. The cut off date is 24 June 1994, the date of the establishment of the present Court of Appeal. It is true that of all the cases mentioned above *Wee Choo Keong* appears to be the only judgment of this court delivered after that date besides *Selvanathan a/l Savarimuthu* which was also decided on the ground that there was no right of appeal.

I shall now consider the wording of art 121(1B).

Article 121(1B) was inserted by Act A885. The same amendment Act amended the then existing art 121(2) by changing the name of the 'Mahkamah Agong (Supreme Court)' to 'Mahkamah Persekutuan (Federal Court)' and secondly, by substituting a new para (a) for the old para (a).

A This is due to the creation of the Court of Appeal. A provision must be made to enable the Federal Court to hear appeals from the newly created Court of Appeal. Other than that, the old provision of cl (2) remains unchanged. For the present purpose, the following words which have remained unchanged are important:

B > There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) ... and the Federal Court shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of ...

Compare that with the wording of art (1B) that creates the Court of Appeal:

C > There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal ... and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of ...

Note that the wording of the two clauses are exactly the same except for the D name of the respective courts.

It is argued that there is no provision concerning the Court of Appeal similar to that of art 128 concerning the Federal Court, in particular cl (3):

> The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by E federal law.

That provision was inserted by Act 26/1963 [Malaysia Act 1963], s 14, and came into force on 16 September 1963 (on the formation of Malaysia) replacing the earlier art 128. It is argued that since there is no such provision regarding the Court of Appeal, federal laws cannot impose restrictions on F the right of appeal to the Court of Appeal. In other words, all decisions of the High Court are appealable to the Court of Appeal.

The question is whether because of the absence of a provision similar to art 128(3) in respect of the Court of Appeal means that all decisions of the High Court are appealable to the Court of Appeal. That depends on whether the provisions of ss 50, 67 and 68 of the Courts of Judicature Act G 1964 are valid, and that depends on whether the provision of art 121(1B) should be read restrictively or whether it should be read together with those sections.

Sections 50 and 67 provide for the jurisdiction of the Court of Appeal in criminal and civil matters respectively. Section 68 goes further to provide H matters which otherwise would be appealable under s 67 are not appealable. Both ss 50 and 67 were substituted for the old ss 50 and 67 by Act A886 and came into force on the same day as Act A885 that, inter alia, created the Court of Appeal, ie 24 June 1994. Section 68 was also amended by Act A886. Subsection (1)(a) was amended by substituting for the words 'one hundred' the words 'two hundred fifty' and by deleting the words 'or a I judge of the High Court'. Subsection (2) was deleted. Subsection (3) was amended by deleting the words 'or a judge of the High Court'. All these amendments came into force on the same day as Act A885, ie 24 June 1994.

So, clearly, these provisions of the Courts of Judicature Act 1964 and art 121(1B) of the Constitution are intended to be read together. The intention of Parliament cannot be clearer than that. A

The words of Suffian FJ (as he then was) in *Tunku Abdullah*, reproduced earlier are also relevant.

Furthermore, the observation made by Steve Shim CJ (Sabah & Sarawak) in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd* [2002] 1 MLJ 385 supports this view. Even though the learned Chief Judge was interpreting Act 121(2), as has been pointed out, the wording of cl (2) and cl (1B), in so far as they are material for the present discussion, is identical. The learned Chief Judge, at p 660 of the report says: B C

> In my view, art 121(2) of the Federal Constitution is a general provision relating to the jurisdiction of the Federal Court. It is an empowering provision which states that the Federal Court shall have jurisdiction to determine appeals from decisions of the Court of Appeal and the High Court. It is pertinent to note the conspicuous absence of the word 'all' or 'any' preceding the word 'decisions' in the provision. If it was the intention of Parliament to confer jurisdiction on the Federal Court to hear appeals from all decisions of the Court of Appeal, the word 'all' or 'any' would have been included therein. The exclusion of those words, in my view, was clearly deliberate. It was intended that not all decisions are appealable. D

Of course, having said that, the learned Chief Judge went on to consider the provision of art 128(3), which has no equivalent in respect of the Court of Appeal. However, I am only relying on his view regarding the provision of art 121(2) which is, in substance, in pari materia with art 121(1B). E

In this connection, it is argued that vesting of the jurisdiction by the constitution in the Court of Appeal to hear appeals from the High Court cannot be detracted, limited or restricted by a federal law, even though federal law may regulate it. Examples of such 'regulations' are the requirement to file a notice of appeal and the requirement to obtain leave in certain cases. F

I have no problem with the first example. But, there is clearly a problem in respect of the requirement to obtain leave. Leave may be granted or refused. When leave is refused, following this argument, does it not mean that a constitutional right has been refused in the exercise of a federal law? It is the federal law, ie the Courts of Judicature Act 1964 that provides for such requirements, not the Constitution. This, to my mind, shows that the provision of the Constitution should be read together with the provisions of the Courts of Judicature Act 1964. To hold otherwise would lead to a conclusion that even ss 50, 67 and 68 of the Courts of Judicature Act 1964 are void and unconstitutional. It means that all decisions of the High Court are appeallable to the Court of Appeal. With respect, I do not think that art 121(1B), even in the absence of a provision similar to art 128(3), being a general provision, can be read in such a restrictive way. G H

On these grounds, in my judgment, the decision of an election judge in question is not appealable to this court. The appeal is therefore dismissed with costs. I

A My learned brother Mohd Saari Yusoff has read this judgment in draft and has expressed his agreement with it.

KC Vohrah JCA: My learned brother Abdul Hamid Mohamad JCA has already set out the relevant facts concerning this appeal which arise from two election petitions. As was made clear by my learned brother when the B appeal came up before us, we requested counsel for all parties to address us on the issue whether a decision of an election judge in an election petition is appealable to this court.

It will be noted that under art 118 of the Federal Constitution, no election to the House of Representative or to the Legislative Assembly of a C state shall be called in question 'except by an election petition presented to the High Court having jurisdiction where the election was held.

In Malaysia there are two High Courts (see art 121(1)), one in the states of Malaya and the other in the states of Sabah and Sarawak. The two election petitions were heard in the High Court, States of Sabah and Sarawak, situated in Kota Kinabalu, the capital of Sabah.

D To be noticed is that art 118 does not specifically create a special tribunal. It only provides that no election shall be challenged except by way of an election petition; it is the High Court that hears the challenge and the challenge must be by way of an election petition.

The election laws of the country are contained in several pieces of E legislation including the Election Offences Act 1954 ('the Act'). Section 34(1) of the said Act provides for the appointment of an election judge (as defined under s 2 and meaning the Chief Judge or any judge nominated by him under s 33). The trial of the election petition is conducted by the Election Judge (see s 33 and Part VII generally). However, and unless otherwise ordered by the Chief Judge, all interlocutory matters may be dealt F with and decided by a judge of the High Court whose decision shall be final (see s 33(4)).

Election judges are appointed to deal with election cases shortly after elections are held in order for speedy disposal of such cases and for their specialist knowledge which they would have picked up in past cases dealt G with after previous elections or which they would pick up as they go along hearing scheduled cases. They are High Court judges essentially dealing with cases of a particular nature just as we have in Kuala Lumpur specialist judges dealing with criminal law, commercial law, family law and administrative law cases save that election judges are appointed under a specific statutory provision under the said Act, while these other judges H are appointed administratively (see s 20 of the Courts of Judicature Act 1964).

Although the election judge is a High Court judge, yet in an election case, his determination of the election matter before him is declared final.

It is provided specifically under s 36 that at the conclusion of the trial I of an election petition, the election judge 'shall determine whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void and

shall certify such determination' to such appropriate bodies described therein and 'upon such certificate been given, such certificate shall be final.' A

It is clear that the High Court that tries the election petition is not a special tribunal; it is one of the High Courts constituted under art 121(1), for the states of Malaya or for the states of Sabah and Sarawak, save that there is an Election Judge who is nominated to hear the case. It is the High Court wherever situated having jurisdiction where the election was held that hears and determines the case, and it is settled law with the Federal Court case of *Wee Choo Keong v Lee Chong Meng & Anor* [1998] 1 MLJ 439 that the court in art 181 is not an inferior court nor a statutory authority nor a tribunal, but is in fact the High Court. This was what was stated by Peh Swee Chin FCJ speaking for the Federal Court in *Wee Choo Keong* at pp 438–439: B C

> It is our view that the court in which the election judge sits on hearing an election petition under the Election Offences Act 1954 ('the Act') is not an inferior court or any statutory authority or tribunal which is amenable to an order of certiorari. Prerogative orders cannot be issued by the High Court against an election court which is not an inferior court for the following reasons. D
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> Inter alia, this is because s 33 of the Act provides that an election petition should be heard by the Chief Judge of the High Court or a judge of the High Court nominated by the former; that any failure of a witness to attend court by an order of the election judge would make such a person 'guilty of contempt of court' and that any High Court judge can deal with any interlocutory matters of the election petition, even though apparently he is not so nominated by the Chief Judge. Such election petition has not been known to have been filed anywhere else except in the High Court like the election petition in which in the instant application for leave was concerned. ... E
>
> Article 118 of the Federal Constitution provides that an election can only be called in question by an election petition presented to 'the High Court'. The High Court is the designated court for an election judge to sit in. This is by far the most significant pointer as regards the status of an election court. Yet another strong pointer is in the definition in s 2 of the Act when it defines 'Election Judge' as the Chief Judge or any judge nominated by the Chief Judge. F G

Peh Swee Chin FCJ continued at p 439:

> Further, the Courts of Judicature Act 1964 sets out the jurisdiction of the High Court and its s 24 deals with civil jurisdiction specifically in regard to divorce, bankruptcy, companies, probate or will, etc. *But it does not mention election petitions. Article 118 of the Federal Constitution in our view, seems to provide the High Court with this additional specific jurisdiction not mentioned in the said Act.* H
>
> *We are of the view that the election court is, in fact, the High Court.* (Emphasis added).

It is argued that since the court which heard the two election petitions is a High Court, then there should be a right of appeal to the Court of Appeal as the Court of Appeal under art 121(1B)(a) has jurisdiction 'to determine appeals from decisions of a High Court or a judge thereof (except decisions I

of a High Court given by a registrar or other officer of the court appealable under federal law to a judge of the Court)'.

It is to be noted, however, that under art 121(1B)(b), the Court of Appeal shall have 'such other jurisdictions as may be conferred by or under federal law'. I think the language is clear that the Court of Appeal may be given jurisdiction to determine cases which do not come directly from the High Court but that is a different matter and does not concern us in this case.

Mr Gavan Griffith QC, counsel of the appellants, argues that the primary jurisdiction conferred under art 121(1B)(a) upon the Court of Appeal is to hear appeals from decisions of the High Court or of a judge thereof. While the primary jurisdiction may be enlarged by virtue of art 121(1B)(b), it is not to be abrogated, limited or restricted and any attempt to abrogate, limit or restrict the primary jurisdiction is void for inconsistency under art 4(1) of the Constitution. Since art 118 of the Constitution and ss 32, 33 and 36 vest jurisdiction exclusively in the High Court to the extent that s 36 purports to exclude the jurisdiction of the Court of Appeal, it is void and of no effect by virtue of art 4(1) being inconsistent with art 121(1B)(a) of the Constitution.

I agree with the view and I also agree that cases decided before the date of the creation of the Court of Appeal, and which have been cited to us by counsel for the respondents, have to be considered in the context of the law as it stood before that date.

To my mind, we would have to view as pivotal the date 24 June 1991, the date of the coming into force of the Constitution (Amendment) Act 1994 (Act A885) which provided, inter alia, for the establishment of the Court of Appeal.

Before that date, the superior court system comprised the two courts of original jurisdiction, the High Court of the States of Malaya and the High Court of the States of Sabah and Sarawak, and an appeal court and the Supreme Court (which became known as Federal Court from that date). The Supreme Court was the final court of appeal in the two tier system when appeals to the Judicial Committee of the Privy Council were abolished with effect from 1 January 1985.

What has to be noted is that when this Supreme Court was the final court of appeal in the two tier superior court system, its appellate jurisdiction (under the then cl 2(a) of art 121) was exclusive jurisdiction 'to determine appeals from decision of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the court' (substantially similar to the language used in the present cl 1B(a) for the Court of Appeal) and it also had 'such jurisdiction as may be conferred by or under federal law' (cl (2)(b)(c) similar to the present cl 1B(b) for the Court of Appeal).

But the then Supreme Court had and the present Federal Court has additional jurisdiction, ie 'such original and consultative jurisdiction' which is specified in arts 128 and 130. What is crucial to note is under the then cl (3) in art 128 before 4 June 1994 was this provision:

(1) ... A

(2) ...

(3) The jurisdiction of the Supreme Court to determine appeals from a High Court or a judge thereof shall be *as provided by federal law.* (Emphasis added.)

It is to be noted that cl (3) of art 128 has its genesis in art 128(1) as it originally stood: B

(1) The Supreme Court shall have such original, appellate and revisional jurisdiction *as may be provided by federal law.*

(2) ... (Emphasis added.)

While the present Federal Court still has the additional original and consultative jurisdiction as is specified in arts 128 and 130 as from 1 June 1994 what is significant is that cl (3) of art 128 has been retained for the Federal Court with suitable language to take into account the newly created Court of Appeal. It reads: C

(1) ... D

(2) ...

(3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such *as may be provided by federal law.* (Emphasis added.)

As clear as crystal, not all appeals from the Court of Appeal, the High Court or a judge thereof may end up in the Supreme Court for determination as federal law may provide what may end up there for determination (see the Federal Court case of *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas* where it appears art 121(2)(b) was read in the context of art 128(3)). E

The provision for federal law to provide the Federal Court's jurisdiction to determine appeals from courts inferior to it in the superior court system is significantly absent in respect of the Court of Appeal's jurisdiction to determine appeals from the High Court; it is an open ended jurisdiction. To my mind, Parliament was fully aware of cl (3) to art 128 when deliberately providing in cl (3) to art 128 accommodation for the reality of a new Court of Appeal and choosing deliberately not to have such a clause for the Court of Appeal's jurisdiction, fully cognizant that the restrictive nature of cl (3) of art 128 for the Federal Court is needed so that the Federal Court, being the highest judicial institution, should only deal with appeals of the highest public or national importance to the country and give its institutional imprimatur and approval with decisions on such appeals and not be flooded with all and sundry appeals. F G H

There are a number of cases cited by Mr Ansari Abdullah to show that it has long been established that there can be no appeal from an Election Court but with respect we need to view all these cases against the background of what I have just adumbrated upon, but before that I would need to consider two other salient matters. I

Firstly, we need to remind ourselves that in the overall scheme for the appellate jurisdiction of the two appellate courts in the three court superior

court system is that the Federal Court, being the ultimate court of appeal, should deal in its appellate jurisdiction with appeals which are not the ordinary run of the mill appeals, as was stated earlier, but appeals that raise issues of law of public or national importance where its decision settles the law ultimately. It is in this recognition of the important role of the Federal Court that federal law, as provided in art 128(3), may provide its jurisdiction to determine appeals from the Court of Appeal or the High Court. Federal law may statutorily bar completely certain appeals from the Court of Appeal or the High Court from going to the Federal Court.

Next, we need to remind ourselves that in the scheme of the three superior court system, the High Court is a court of first instance which is essentially a trial court (though it is an appellate court as well for appeals from the subordinate courts and it also possesses revisionary powers), more concerned with the finding of facts and with the application of the relevant law as the facts and justice of the case demand. A decision maker who is a finder of facts almost universally, especially in a court system, will not have his finding of facts disturbed unless the finding is perverse or there has been a misdirection which amounts to a mistake of law and that is rare. Otherwise it is a legal truism that if it is a pure finding of facts which does go up on appeal there is no likelihood of the matter succeeding an appeal It is in this area in the interpretation of the law or the application of the law that a decision maker may be in error and it is in this area that his decision commonly goes up on appeal for determination; the appeal will be on a question of law or on a mixed question of law and fact. The court that is most suitable to determine that is the Court of Appeal. All aggrieved litigants must be allowed to apply to the Court of Appeal for leave to appeal which then determines whether the grievance is purely a question of a finding of facts which the court will reject or whether the grievance is that there is a misdirection on a question of law or a question of mixed law and fact where the Court of Appeal will decide that the grievance requires a looking into on appeal.

There obviously needs to be regulation of the right of appeal, not a prevention of appeal, where pure findings of facts are challenged, where frivolous and vexatious cases, de minimis cases, cases relating to costs only where discretion is left to the judge, are brought up and clog the machinery of the Court of Appeal. The time honoured device to weed out obviously unmeritious cases from going on for appeal is through the system where an application for leave to appeal has to be made. The leave system does not prevent access to the appellate court; it imposes a set of time honoured criteria which are judicially considered to allow only cases where, on material supported by affidavit, merits are disclosed for an arguable case and for such cases to be given leave to go up on appeal to be determined by the appellate court. The application for leave is not left to an executive to decide but to judges who have to judicially consider on the material put before them that there is an arguable case. For the leave application the several criteria to be judicially considered arise through judicial decisions, rules of court, federal and state law and may for example include time bars to prevent stale cases from being brought up. Federal law, to my mind, may

regulate the leave system not so much as to prevent or deny completely an aggrieved litigant from appealing, but to give him an opportunity to first show in some time tested areas where appeals do not normally succeed that he has an arguable case, and it is for that reason that s 68 of the Courts of Judicature Act 1964 has been enacted. It is to be noted that s 68 does not prevent or completely bar appeals to the Court of Appeal except for those cases involving consent judgments and those cases where written law says the order is final. No one can dispute the wisdom of barring an appeal where there has been a consent judgment. As for the other provision where an appeal is barred where federal law has provided that the order is final, what I have to say about s 36 of the said Act applies equally to that provision. As for appeals on other matters, s 68 regulates such appeals by placing a threshold amount on the value of the subject matter of appeal (para (a)), below which leave is needed or placing the need for an application for leave to appeal where a judge has exercised his discretion in relation to costs (para (b)); the applicant who wishes to appeal goes to the Court of Appeal and has his case judicially considered whether he should be allowed leave to appeal. It will be noted that it is not what s 36 of the Election Act does; s 36 completely bars an appeal as it provides that the determination after the election judge has made his determination upon a certificate of such a determination being given, the determination is final. To the extent that s 36 of the said Act purports to exclude the jurisdiction of the Court of Appeal to hear an appeal from a final order of an election judge, it is void and of no effect by operation of art 4(1), it being inconsistent with art 121(1B)(a) of the Constitution. Similarly, para (d) of s 68 of the Courts of Judicature Act 1964 which purports to exclude the jurisdiction of the Court of Appeal by providing that where by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final, no appeal shall be brought to the Court of Appeal, is void and of no effect.

A B C D E F

I now come to the many cases which were cited to show that the Court of Appeal cannot entertain an appeal from the order of which is stated by federal law to be final. We have of course to remind ourselves that these cases were decided before the Court of Appeal was established and the provisions of law to consider will be those before the date of the establishment of the Court of Appeal. We do also have to remember the supremacy of the Constitution and that no common law principle nor historical reason nor federal or state law can override the Constitution and in the context of the clear words of art 121(1B)(a) with effect from 24 June 1994, no one, to adopt the words of Lord Wilberforce in *Raymond v Honey* [1983] 1 AC 1 at p 12, should be 'shut out from the seat of justice', here, I mean the Court of Appeal, if he is aggrieved with the decision of the High Court.

G H

Take one case, for example, *Re Perting Timor Election (No 2)*, a judgment of the former Supreme Court which ruled that an interim or interlocutory order made by an election judge is not appealable because neither in the Courts Ordinance 1948 nor in the Election Offences Ordinance is there a right of appeal. The court had remarked in passing that

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A the judge had not determined the issues set out in s 36 of the Election Offences Ordinance 1954 (by which name the Election Offences Act 1854 was then known as) as he had not certified his determination; that if he had, such determination would have been final and no appeal would, for s 36 states, inter alia, 'upon such certificate been given, such determination shall be final'.

B To be noted is that when this decision was made in 1962, the relevant provision of the Constitution in respect of the Supreme Court was then art 128(1) which reads:

> (1) The Supreme Court shall have such original, appellate and revisional jurisdiction as may be provided by federal law.
>
> C (2) ...

Federal law could and did provide for the jurisdiction of the Supreme Court not to extend to a judge's determination of matters provided in s 36 of the Election Offences Ordinance, where he gave his determination in a certificate and 'upon such certificate being given, such determination shall D be final'. What is to be noted, however, in respect of our present Court of Appeal is that its jurisdiction is 'to determine appeals from decisions of a High Court or a judge thereof ...' and that the jurisdiction of our present Federal Court is 'to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law'.

E In *Tunku Abdullah v Ali Amberan* [1971] 1 MLJ 25 where several cases including *Re Perting Timor Election* and *Devan Nair* were considered, the appellant sought to appeal to the then Federal Court from the decision of the election judge against the finding that he was guilty of corrupt practice. Suffian FJ (as he then was) referred to the historical reason given by Lord Upjohn in *Devan Nair* at p 262:

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> Constitutionally, decisions on questions of contested elections are vested in the Assembly for which the contested election has been held, but in the course of the 19th century many countries, including this country and many of Her Majesty's possessions overseas, adopted the view that, as the deliberations of the Assembly itself were apt to be governed rather by political consideration G than the justice of the case, it was right and proper that such questions should be entrusted to the courts. This required legislation in every case, and in many cases, the right of appeal after the hearing of an election petition by an election tribunal to which those hearings were entrusted was severely limited clearly for the reason that it was essential that such matters should be determined as quickly as possible, so that the assembly itself and the electors of the representatives thereto should know their rights at the earliest possible H moment.

But Suffian FJ quite clearly noted that art 118 was not brought to the attention of that court, though in an earlier case of *AJ Arzu v Arthurs & Anor* [1965] 1 WLR 675, the same court in spite of an express provision in a British Honduras legislation for an election petition to be tried by a judge I of the Supreme Court did not hesitate to give effect to another provision which provided that the judge should determine the matter referred to him, certify his determination to the Government and that upon such

certification being given, his determination shall be final. And Suffian FJ was actually aware that the problem had to be viewed against the provision of our constitution.

This is what his Lordship stated at p 27:

> In my judgment, there is no inconsistency between our Election Offences Act and art 118 of the Constitution, for art 118 does not guarantee the citizen the right of appealing against the decision of a High Court judge, and it is therefore open to Parliament to provide (by law) which decisions of a High Court may be appealed against and which not. By s 36 of the Election Offences Act, Parliament has clearly provided that the determination of a judge hearing an election petition shall be final. ...

It has to be noted that this case arose in respect of a matter in 1969 and the appeal against the election judge's decision was heard in 1970. The court appealed to was the then Federal Court and there was no intermediate court between the High Court and the Federal Court. Although Suffian FJ did not specifically mention the constitutional provision in his judgment, in fact, when he said it was open to Parliament to provide by law which decisions of a High Court may be appealed against, he must have had in mind art 128(3) which then provided that the jurisdiction of the Federal Court to determine appeals may be as provided by federal law.

Again, to be noted, in our present situation while the present Court of Appeal is an intermediate court between the High Court and the Federal Court there is no provision like art 128(3) which bars appeals to the Court of Appeal save as provided by federal law.

I do not think it would be necessary to consider the other cases decided before the establishment of the present intermediate Court of Appeal where the Federal Court's appellate jurisdiction was determined by federal law made under art 128(3). Suffice it to say that while there is such a provision for the Federal Court's appellate jurisdiction, there is none for the appellate jurisdiction of the court which means the Court of Appeal's appellate jurisdiction cannot be abrogated, limited or restricted.

I am mindful that for the interpretation of the Constitution, art 160(1) provides, inter alia, that the Interpretation and General Clauses Ordinance 1948 as was in force immediately before Merdeka Day (1 August 1957) shall to the extent specified in the Eleventh Schedule apply for the interpretation of this constitution. I have found nothing in the whole of art 160 or in the Eleventh Schedule which runs counter to the interpretation I have placed on the Constitutional provisions. On the other hand, I had in mind the exhilarating words of wisdom of Raja Azlan Shah, Acting Lord President (as he then was) expressed in the Federal Court case of *Dato' Menteri Othman bin Baginda & Anor* at p 32:

> In interpreting a constitution, two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21). A constitution is *sui generis*, calling

A for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages B which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms' ...

C Article 118 has provided for the challenge of an election by way only of an election petition presented to the High Court having jurisdiction where the election was held. It will be noted that s 42 of the said Act provides the practice and procedure on election petitions which 'shall be regulated by rules of court'. Order 9 of the Rules of the High Court 1980 makes general provisions relating to petitions by which civil proceedings in the High Court D are begun and subjects them to any special provisions relating to petitions of any particular class made by any written law. It is obvious election petitions belong to a particular class. So far as an election petition is concerned, it is an originating process and the proceedings are governed by the rules of the court contained in the Second Schedule to the said Act until varied or revoked by rules of court (see s 42(2)). It will be seen from s 35 of E the said Act that a petitioner may claim reliefs which are essentially declarations, ie a declaration that the election is void, a declaration that the person was not duly elected or ought to have been returned, a declaration that any candidate was duly elected and ought to having been returned. The petitioner may apply for a scrutiny of the votes for an unsuccessful F candidate on the ground that he had a majority of lawful votes. All these remedies, the subject matters petitioned for, do not have monetary value caught by s 68(a) of the Courts of Judicature Act 1964, and an appeal relating to any of the subject matters should qualify for automatic appeal to the Court of Appeal without need for a leave application.

G Here, the two appeals have no monetary value attached to the subject matter and do not come within the provisions of paras (a) or (c) of s 68 of the Courts of Judicature Act 1964 where leave is needed. The appeal in relation to the two petitions is not affected by para (d) of s 68. I have already held para (d) of s 68 to be inconsistent with art 121(1B)(a) and it is therefore void and of no effect by operation of art 4(1) of the Constitution.

H I see no impediment to the appeal being determined by the Court of Appeal and do so order that it be heard on the merits.

Appeal dismissed.

I Reported by Peter Ling